

# Making the Web Work for Science: Intellectual Property Rights

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# Forms of Intellectual Property

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- ▶ **Patents**
- ▶ **Trademarks**
- ▶ **Copyrights**
- ▶ **Trade Secrets** ) not
- ▶ **Rights of Privacy and Publicity** ) today

# The Purpose of Intellectual Property Laws

- ▶ **Intended to protect and promote creative and inventive works**
- ▶ **U.S. Constitution, Article I, Section 8, empowers Congress, among other things:**
  - “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”

**Note: copyrights and patents share the same family tree; trademarks do not**

# U.S. Patent Law

- ▶ **Patents protect inventions that are useful AND novel AND not obvious**
  - Process – a new way of doing something (ex.: delivering medicines in capsules instead of tablets)
  - Machine – an inventive thing that does something (ex.: Eli Whitney’s cotton gin)
  - Article of Manufacture – any human-made structure that has inventive characteristics (ex.: a new snow tire)
  - Composition of Matter – combination of natural elements in a new way that results in something useful (ex.: some stem cells)
  
- ▶ **Much shorter (20 years), but (most agree) much stronger, protection than copyrights**

# U.S. Trademark Law

- ▶ **A trademark or service mark is a distinctive mark, symbol or logo used to identify a product's or service's source and quality**
  - Examples: word, image, logo, shape (original “swirling” Coke bottle), color (pink on Owens-Corning insulation), sound (NBC's three tones).
- ▶ **Trademark law a species of consumer protection law as opposed to a species of property law**
- ▶ **Trademarks can live forever, as long as they continue to be in use**
  - Example: “Budweiser” was first used as a mark in the 1600s.

# U.S. Copyright Law

- ▶ **Protects the authors of “original works of authorship”**
- ▶ **Covers both published and unpublished works**
- ▶ **Grants copyright holders the exclusive rights to reproduce, perform, distribute, translate and publicly display their works (or to authorize others to do so)**
- ▶ **Ordinarily protects works created on or after January 1, 1978, until 70 years after the author’s death**
- ▶ **Registration is not required; nor is the © symbol**
  - Protection is automatic from the time a work is created in a fixed, tangible form

# Three Fundamental Requirements for Copyright Protection

- ▶ **Fixation** – the work must be recorded in a tangible form that others can perceive (either directly or with the aid of a machine, such as a computer)
- ▶ **Originality** – the work must be one that you created yourself (but the creativity involved can be minimal)
- ▶ **Eligible** – the work must fall within one of the defined categories of works

# What Can Be Protected by Copyright

## ▶ **Literary works**

- text-based works, including books, articles, abstracts, **software** and **certain databases**

## ▶ **Pictorial, graphic and sculptural works**

- including illustrations and drawings published in journals; also Dilbert cartoons

## ▶ **Musical works, including any accompanying words**

## ▶ **Dramatic works, including any accompanying music**

## ▶ **Pantomimes and choreographic works**

## ▶ **Motion pictures and other audiovisual works**

## ▶ **Sound recordings**

## ▶ **Architectural works**

# What Can NOT Be Protected by Copyright

- ▶ **Ideas, facts, data, procedures, methods, systems, processes, concepts, principles, discoveries or devices, as distinguished from a description, explanation or illustration**
  - The idea is not protected but the expression of the idea may be
- ▶ **Works that have not been fixed in a tangible form by being written, recorded or captured electronically**
- ▶ **Titles, names, short phrases or slogans; ordinary (non-artistic) symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listings of ingredients or contents**

# What Can NOT Be Protected by Copyright (continued)

- ▶ **Works consisting entirely of information that are natural or self-evident facts, and that contain no original authorship, such as the white pages of telephone books, standard calendars, height and weight charts, and tape measures and rulers**
- ▶ **Works created by the U.S. Government**
- ▶ **Works for which copyright has expired**

NOTE: The “PUBLIC DOMAIN” is not the same as “publicly available”. PUBLIC DOMAIN is the term of art used to describe the sum of all the above items.

# Are All Government Works in the Public Domain?

- ▶ **No – only works created by U.S. federal (not state or foreign) government employees within the scope of their employment**
- ▶ **Works by private contractors are governed by their contracts with the government (may be work-for-hire)**
- ▶ **Copyrighted works published in government publications do not lose their © protection**
- ▶ **Government works published in non-government publications do not gain © protection**

# Digital Content and Copyright

- ▶ **Content in digital form is protected to precisely the same extent as content in non-digital form.**
- ▶ **Electronic books and journals are protected by copyright law, just like paper books and journals.**
- ▶ **Digital musical recordings are protected by copyright law, just like vinyl musical recordings.**
- ▶ **An e-mail message is protected by copyright law, just like a pen-and-ink letter.**

# Who is the “Author”?

## Who Owns the Copyright?

**General Rule:** The author is the human being who does the creative work. However, there are two big exceptions:

### ▶ Works Made for Hire

- works produced by employees within the scope of their employment are owned by the employer (that is, the employer is the “author” immediately upon creation); and
- certain works by independent contractors (and these also need an explicit writing signed by both parties)

### ▶ Transfers of Exclusive Copyright Rights (including ownership in whole or in part)

- must be in writing and must be signed by copyright owner

# Ownership of Copyright

- ▶ **Ownership of copyright in a work is separate and distinct from ownership of the object in which the copyrighted work is embodied**
  - Owning a book does not mean you own the copyright in that book
- ▶ **Joint ownership by multiple authors is possible, and cases have found that joint ownership does not require any explicit agreement between the authors**
- ▶ **In scholarly publishing, the publisher usually obtains outright ownership of the copyright in a manuscript submitted for publication (as the result of a signed transfer document)**

# When is a Protected Work “Copied”?

- ▶ **Substantial similarity plus access equals copying**
- ▶ **Very subjective standard**
- ▶ **Copying of ideas is not enough**
- ▶ **For some works, “errors in common” between the original and the alleged copy are used as evidence of copying**

# Four Statutory Fair Use Factors

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1. The purpose and character of the use
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used
4. The effect of the use on the market or the potential market

Let's look at those in a bit more detail . . .

# Four Statutory Fair Use Factors

## 1. How the work is being used

- Socially productive?
- Commercial or noncommercial?
- Did the user act in good faith?

## 2. Nature of the work

- Creative vs. factual works
- Quotations
- Pictures and graphics
- Scientific and scholarly works
- Published vs. unpublished

# Four Statutory Fair Use Factors

## 3. Amount and importance of material used

- Amount copied
- Importance to the total work

## 4. Effect on the market or potential market for the copyrighted work

- How can someone with “exclusive” rights successfully sell what is being given away by others for free?

**After evaluating each of the factors in context, the analysis requires that the results of the individual evaluations be weighed against each other.**

# Questions?

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